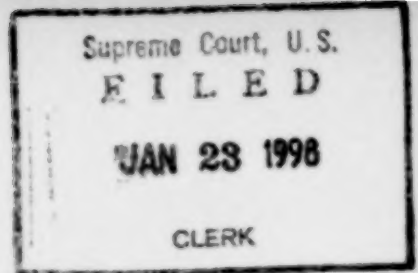


(9)
No. 96-8422



**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997**

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF OF GUN OWNERS FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER SILLASSE BRYAN**

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 96-8422

SILLASSE BRYAN, Petitioner

v.

UNITED STATES OF AMERICA

**BRIEF OF GUN OWNERS FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER SILLASSE BRYAN**

INTEREST OF THE AMICUS CURIAE

Gun Owners Foundation is an Internal Revenue Code Section 501(c)(3) organization incorporated under the laws of the Commonwealth of Virginia. Its purposes are to educate the public about the importance of the Second Amendment to the United States Constitution and to provide legal and other assistance for law-abiding individuals involved in firearms-related cases. GOF's more than 100,000 contributors are, by self-definition, strongly interested in the right to keep and bear arms and in opposing legislation and judicial interpretations which burden or impede that right.¹

1. The Foundation, for example, was *amicus curiae* in support of the decision by the Court last term to declare those portions of the Brady Act properly before it unconstitutional. *Printz v. United States*, 117 S.Ct. 2365 (1997). See 1996 WL 468617. Counsel of record

The right to keep and bear arms (and to inherit, own, collect, use and bequeath them) is, of course, largely meaningless without the ability to buy, sell, and trade firearms, and to transfer them to and from gunsmiths and artisans for repairs, modification or restoration.²

The proper interpretation of federal laws governing firearms licensing and regulation and their criminal enforcement are therefore of significant concern to gun owners and collectors. This is not least so in view of the well-documented history of constitutional rights abuses of gun owners by the federal agency principally responsible for enforcement of the federal firearms statutes, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms ("BATF").³ Importantly, BATF has a consistent

authored this brief in its entirety and no person or entity made any monetary contribution to the preparation or submission of the brief.

2. "The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. 165, 178, 8 Am.Rep. 8, 13 (1871).

3. See, e.g., Senate Committee on Appropriations, *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms*, 96th Cong., 1st Sess. (GPO; Washington, D.C.; 1979); *id.*, 96th Cong., 2d Sess. (GPO; Washington, D.C.; 1980); David T. Hardy, *The BATF's War on Civil Liberties: The Assault on Gun Owners* (Second Amendment Foundation; Bellevue, Wash.; 1979). See also, U.S. Department of the Treasury, *Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Wayne Howell* (GPO; Washington, D.C.; September 1993); Transcript of Joint Hearing of the Crime Subcommittee of the House Judiciary Committee and the National Security, International Affairs and Criminal Justice Subcommittee of the House Government Reform and Oversight Committee, *Review of the Siege of the Branch Davidians' Compound in Waco, Texas*, 104th Cong., 2d Sess. (Federal News Service; Washington, D.C.; July 19, 1995 - August 1, 1995); House Committee on the Judiciary and Committee on Government Reform and Oversight, *Materials Relating to the Investigation into the Activities of Federal*

history of abusing its authority under the statute regulating the purchase and sale of firearms which is at issue in this case.⁴

By letter dated January 12, 1998, the Solicitor General of the United States consented to the filing of this brief. By letter dated January 13, 1998, counsel for the petitioner consented to the filing of this brief.

STATEMENT OF THE CASE

The Foundation adopts the parties' Statements of the Case. We note that the decision of the Court of Appeals has now been reported at 122 F.3d 90.

ISSUE PRESENTED

The petitioner in this case has formulated the issue as follows:

1. Should this Court resolve a split of decisional authority at the Circuit Court of Appeals level on whether a conviction for violation of 18 USC 922 (a)(1)(A) requires proof that Petitioner was aware of the requirement for, but dispensed firearms

Law Enforcement Agencies toward the Branch Davidians, 104th Cong., 2d Sess. (GPO; Washington, D.C.; August 1996).

4. *Ibid.* The fact that the petitioner here is apparently not himself the subject of legal abuse is no more relevant to decision than the suggestion of the government that he is not a particularly appealing litigant. Brief for the United States re Certiorari, pp. 2, 5. Gideon, Miranda, Aguilar, Escobedo, Lopez, *et al.*, were also no angels; however, their causes were just. Our point is that repeated government abuse of a particular statute is an important reason for the Court to scrutinize that statute closely; the character of the abused is irrelevant.

without benefit of a federal firearm dealers license?

2. Did trial Judge [sic] err in charging jury that it need only find that Petitioner acted "knowingly" and not "willfully" in trafficking in firearms without a federal firearms license by declining to instruct the jury that it must find that Petitioner knew he required a Federal firearms license?

The government has restated the question presented as:

1. Whether a conviction under 18 U.S.C. 924(a)(1)(D) for willfully violating 18 U.S.C. 922(a)(1)(A), which prohibits dealing in firearms without a federal license, requires the jury to find that the offender knew of the federal licensing requirement and nonetheless sold firearms without a license.

The *Amicus* is mindful of the stricture of Rule 14.1(a) of the Court that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." With due deference to the parties and with no intended violence to Rule 14.1(a), the *Amicus* submits that a more precise formulation of the issue is:

Whether conviction for unlicensed dealing in firearms in violation of 18 U.S.C. § 922(a)(1)(A) requires proof beyond a reasonable doubt that the defendant knew of the federal licensing requirement and

consciously disregarded it, and that the jury be properly instructed on the requirement of proof of the defendant's specific knowledge.

The *Amicus* respectfully submits that the correct answer to this question is "Yes."

SUMMARY OF ARGUMENT

Even without evidence of congressional intent as to the requisite standard of *scienter* necessary to sustain a conviction for unlicensed firearms dealing under 18 U.S.C. § 922(a)(1)(A) the Court would be warranted by long-standing precedent in holding that specific knowledge of the legal requirement for a federal firearms license must be proved beyond a reasonable doubt.

Here, however, there can be little doubt of Congress' express intention to require specific knowledge of the statutory requirement for a firearms dealer license. This intention is found explicitly in the extensive legislative history of the statute and implicitly in a structural analysis of the statute itself.

The specific knowledge requirement is also supported by the better reasoned decisions of the courts of appeals.

ARGUMENT

I. Even without evidence of congressional intent as to the requisite standard of *scienter* necessary to sustain a conviction for unlicensed firearms dealing under 18 U.S.C. § 922(a)(1)(A) the Court would be warranted by long-standing precedent in holding that specific knowledge of the legal requirement for a federal firearms

license must be proved beyond a reasonable doubt.

Any discussion of *scienter* or willfulness in federal criminal law must begin with *Morissette v. United States*, 342 U.S. 246 (1952). There, Justice Jackson crafted a graceful exegesis of the law of criminal intent on behalf of an undivided Court.⁵ In that case, the Court stated (342 U.S. at 251):

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

The Court was unreceptive to the notion that Congress, in the absence of a clearly expressed intention, meant to omit a *mens rea* element from a criminal statute. *Id.* at 261-263. Rather, the Court concluded, there was a presumption that *mens rea* was a necessary element in any federal crime unless congressional intent to the contrary is found. *Id.* at 263. The Court also noted that the harshness of the penalty imposed by a statute was a consideration in whether Congress had intentionally omitted a *mens rea* element: "felony is ... as bad a word as you can give to man or thing." *Id.* at 260, quoting 2 Pollock and Maitland, *History of English Law* 465. The Court also addressed the

5. Justice Douglas concurred in the result without opinion and Justice Minton took no part in consideration or decision. 342 U.S. at 276.

frequent complaint of prosecutors that a strict requirement of willfulness makes prosecution too difficult:⁶

Of course, the purpose of every statute would be "obstructed" by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore the obstruction rationale does not help us....

Id. at 259. The Court ruled that a federal criminal statute forbidding conversion of government property required a showing that the defendant knew the property belonged to another (*i.e.*, was not abandoned) and intended to convert it to his own use.⁷ The Court had no occasion to address the knowledge of the law issue since it was dealing with a *malum in se* theft statute: "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation...." *Id.* at 260.

Five years later the Court had the opportunity to address the issue of a defendant's required knowledge of the law. In *Lambert v. California*, 355 U.S. 225 (1957), a

6. Government Brief re Certiorari, p. 14: "... proving specific knowledge of federal licensing requirements is quite difficult...." and "Application of Section 924(a)(1)(D) in such circumstances is hampered if the government must shoulder the burden of showing specific knowledge of the requirements of the United States Code as a prerequisite to conviction."

7. Justice Scalia has stated that *Morissette* "applied [the common-law rule of *scienter*] to a statute that ... contain[ed] the word 'knowingly,' in order to conclude that 'knowingly converts' requires knowledge not merely of the fact of one's dominion over property, but also knowledge of the fact that that assertion is a conversion, *i.e.*, is wrongful." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 80 (1994) (dissenting opinion).

prosecution under Los Angeles' felon registration ordinance, the Court stated the question as one of

whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

Id. at 227. Answering the question affirmatively, the Court ruled that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-230. Of interest here, the *Lambert* Court noted that "[m]any such [registration] laws are akin to licensing statutes in that they pertain to the regulation of business activities." *Id.* at 29. In large part, the statute of which Bryan has run afoul is a registration statute such as that in *Lambert*. The crime he is charged with here can only exist by virtue of his failure to "register" as a firearms dealer. In that sense his offense, like the one in *Lambert*, is a sin of omission rather than commission.

In 1985 the Court, in *Liparota v. United States*, 471 U.S. 419 (1985), again held that actual knowledge of the law was required to sustain a federal criminal charge. In a prosecution for unauthorized use of food stamps the Court held "that in a prosecution for violation of [7 U.S.C.] § 2024(b)(1), the Government must prove that the defendant knew that his acquisition of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433.

Again in *Cheek v. United States*, 498 U.S. 192 (1991), the Court held in a prosecution for willful failure to file income tax returns and willful evasion of taxes that

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

Id. at 201. It based this result in part on the fact that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 199-200. Anyone who has tried to make sense of the federal firearms statutes, regulations and forms can resonate to this reasoning.

Finally, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court again addressed the meaning of "willfulness" in a federal criminal statute (31 U.S.C. § 5322(a) -- the "anti-structuring" penalty provision), and held that the defendant in such a prosecution must be shown to have knowledge of the law which forbade his conduct. The Court held:

We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. [omitting citations] In particular contexts, however, Congress may decree otherwise. That, we hold, is what Congress has done with respect to 31 U.S.C. § 5322(a) and the provisions it controls. To convict Ratzlaf of the crime with which he was charged, violations of 31 U.S.C. §§ 5322(a) and 5324(3), the jury had to find he knew the structuring in which he engaged was unlawful.

Id. at 148. The Court reached this result by rejecting the government's argument that money laundering and transaction structuring to avoid reporting requirements were inherently suspect. "But currency structuring is not inevitably nefarious." *Id.* at 144. The Court has made the same point (in response to the same suggestions by the government) in *Staples v. United States*, 511 U.S. 600, 606-615 (1994). *Staples*, of course, rejected a strict liability interpretation of the National Firearms Act as it pertains to machineguns not visibly identifiable as such.

In summary, even in the absence of the explicit *mens rea* requirement found in 18 U.S.C. § 924(d)(1)(A), the Court would be fully warranted in construing it to require proof that the defendant had an evil intent because he knew his acts violated a known legal duty.

II. The requirement for proof of specific knowledge is to be found both in the extensive legislative history and in a structural analysis of the statute itself.

The Firearms Owners' Protection Act of 1986⁸ ("FOPA") is one of those rare congressional enactments whose title does not violate truth-in-advertising principles: It was, in fact, enacted to protect gun owners and enthusiasts from a documented history of abuse by the government in enforcing the Gun Control Act of 1968⁹ ("GCA").

When the GCA was enacted in 1968 its enforcement was entrusted to the Alcohol and Tobacco Tax Unit of the

8. Public Law No. 99-308, 100 Stat. 449-461 (99th Cong., 2d Sess.).

9. Presently chapter 44 of Title 18, United States Code, §§ 921-930.

Internal Revenue Service, a small office of a few hundred employees whose principal responsibilities theretofore had been regulation of the legal alcohol industry and the criminal repression of moonshining and bootlegging.¹⁰ With the expansion of its jurisdiction into firearms generally,¹¹ the unit grew -- first to a division within IRS and then, in 1972, into a full-blown bureau of the Treasury Department. Coincident with this increase in jurisdiction and staff (and bureaucratic stature) came a calamitous event, a tripling of the price of sugar, a mainstay of illegal alcohol distilling.¹² This had the result of doing what Prohibition could not: putting bootleggers out of business. The BATF found itself in the uncomfortable position of having too many agents and too few matters to occupy them. It solved this "problem" by turning its attention to the newly acquired jurisdiction over firearms. Through an over-zealous enforcement of the gun laws, including an over-expansive interpretation of "dealing in firearms" (coupled with questionable investigative tactics and widespread entrapment), it commenced criminal actions against numerous citizens who had no idea they were violating the new federal law licensing firearms dealers.¹³

10. David T. Hardy, *The BATF's War on Civil Liberties: The Assault on Gun Owners*, p. 7 (Second Amendment Foundation; Bellevue, Wash.; 1979).

11. The unit in 1968 already had jurisdiction over the National Firearms Act of 1934, 26 U.S.C. § 5801, *et seq.*, and the Federal Firearms Act of 1938, 15 U.S.C. §§ 901-910 (which was repealed by the GCA). However, enforcement of these statutes required only 214 agents prior to 1968. Hardy, note 10, *supra*, at 7.

12. Hardy, note 10, *supra*, at 7.

13. Hardy, note 10, *supra*, generally; Senate Oversight Hearings, note 3, *supra*; 132 Cong. Rec. H1649 - H1803 (April 9, 1986 (remarks of Congressman Volkmer)).

Congress was required to revisit the matter and did so. Beginning in 1979, it commenced hearings into BATF misconduct, which in one sense have never ended.¹⁴ These hearings and concerns led ultimately, through a tortured and lengthy legislative process to enactment of FOPA on May 19, 1986. Because the process was so lengthy, so partisan, and so controversial, it created a legislative history which is unusual, if not unique, in its completeness. Not only do we have the opposing House and Senate reports,¹⁵ but we have lengthy debates and discussions on

14. See the congressional hearings cited in note 3, *supra*. See also Transcript of Hearing of the Senate Judiciary Committee, *Federal Law Enforcement and the Good Ol' Boys Roundup* (Federal News Service; Washington, D.C.; July 21, 1995); *id.*, *Federal Raid at Waco* (Federal News Service; Washington, D.C.; October 31, November 1, 1995); Transcript of Hearing of the Terrorism, Technology, and Government Information Subcommittee of the Senate Judiciary Committee, *Federal Raid in Idaho (Ruby Ridge)* (Federal News Service; Washington, D.C.; September 6 - September 14, 1995); U.S. Department of Justice, *Report to the Attorney General on the Events at Waco, Texas, February 28 to April 19, 1993* (Washington, D.C.; October 8, 1993 (redacted version)); U.S. Department of Justice, Office of Professional Responsibility, *Department of Justice Report Regarding Internal Investigation of Shootings at Ruby Ridge, Idaho, During Arrest of Randy Weaver* (undated; available on LEXIS Counsel Connect).

15. U.S. Senate, Committee on the Judiciary, Senate Report No. 97-476, *Federal Firearms Owners Protection Act: Report of the Committee on the Judiciary, United States Senate, to Accompany S. 1030, together with Supplemental, Additional, and Minority Views*, 97th Cong., 2d Sess. (GPO; Washington, D.C.; June 18, 1982); *id.*, Senate Report No. 98-583, *Federal Firearms Owners Protection Act: Report together with Additional and Supplemental Views*, 98th Cong., 2d Sess. (GPO; Washington, D.C.; August 8, 1984); U.S. House of Representatives, Judiciary Committee, House Report No. 99-495, *Firearms Owners' Protection Act*, 99th Cong., 2d Sess. (GPO; Washington, D.C.; March 14, 1986).

the floors of both Houses, including detailed statements by all the authors of the competing bills.¹⁶

We also have a comprehensive and near-contemporaneous analysis of the Act by one who was closely involved in the drafting, lobbying and negotiations which preceded its passage.¹⁷ Even casual readings of the legislative reports, the debates and the Hardy article compel the conclusion that the insertion of a willfulness standard into Section 924(d)(1)(A) of Title 18 was explicitly for the purpose of ensuring that the government had to prove certain defendants knew they were violating the Gun Control Act -- an actual knowledge/specific intent standard. The commentators agree:

In light of these extensive considerations, it is impossible to avoid the conclusion that Congress was fully aware that its use of "willfully" in FOPA would require proof that the defendant actually knew of the illegality of his acts.¹⁸

So did the principal opponent of FOPA, Representative Hughes of New Jersey:

Under the NRA bill [*i.e.*, the version which became law], a dealer would practically have

16. *E.g.*, 131 Cong. Rec. 16984 - 17003 (June 24, 1985) (Senate); 132 Cong. Rec. H1649 - H1803 (daily ed., April 9, 1986) (House).

17. David T. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumberland L.Rev.* 585 (1987).

18. *Id.* at 651-652. See also Stephen P. Halbrook, *Firearms Law Deskbook*, pp. 2-8 - 2-11 (Clark, Boardman, Callaghan; Deerfield, Ill.; 1995 and 1997 rev.).

to sign a statement saying that, before committing the crime, he had studied the law, knew what he had in mind was illegal, and did his damndest to make sure he violated the law.¹⁹

Even if the legislative history were not so clear, the structure of Section 924 compels a similar conclusion. Congress was specifically rejecting a strict liability standard previously held by a number of courts to have been the original standard of GCA offenses.²⁰ It did this by amending the penalty provision to provide for a "knowing" standard in the case of the more serious offenses, and a "willful" standard in the case of the less serious, more technical offenses. If "willful" means no more than that the defendant must have been physically conscious of his act or omission without regard to whether he knew it was forbidden by law, then how does it differ from "knowing"? Such an interpretation reads "willful" right out of the law and the courts traditionally will not adopt an interpretation of a statute which renders part of it surplusage, or worse, meaningless.²¹

Thus, even in the absence of any legislative guidance the structure of Section 924(d)(1)(A) would

19. 132 *Cong. Rec.* H1684 (April 9, 1986). In spite of this overwrought hyperbole, it appears that the government could easily have met this burden in this case: "Petitioner admitted to one of his accomplices that he could not buy guns ... because he did not have a license." Trial Tr. 30. Of course, Congressman Hughes' fears could also be allayed by abrogation of the Fourth, Fifth and Sixth Amendments or abolition of the suppression of evidence doctrine.

20. E.g., *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988); *United States v. Carmany*, 901 F.2d 76 (7th Cir. 1990).

21. See the cases and discussion in Part III, *infra*.

compel the conclusion that a violation of Section 922(a)(1)(A) requires proof the defendant knew of the statutory requirement for a license. A defendant who buys or sells a firearm can never do so unwittingly or inadvertently or unconsciously. He will always "know" he is doing so. But to act "willfully," he logically must also know that he should not engage in the transaction. And because the bare act of buying or selling a firearm is neither immoral, illegal nor fattening, he must know that he should not do it because there is a law which specifically forbids it.²²

The purchase, possession, use and sale of firearms are intrinsically neutral acts. Standing alone they have no sinister or evil aspect or moral content; indeed, they enjoy a constitutionally protected status.²³ There are more than 223 million firearms in private hands in the United States²⁴ -- approximately one for every adult citizen. Indeed, this Court has noted that "there is a long tradition of widespread lawful gun ownership by private individuals in this country,"²⁵ and "despite their potential for harm, guns generally can be owned in perfect innocence."²⁶ Every weekend at thousands of gun shows, swap meets, flea

22. "Specifically," because knowledge that, for example, the purchaser is a felon or an addict is evidence of a different offense, but not of unlawful dealing. See *United States v. Sanchez-Corcino*, 85 F.3d 549 at 554, n. 3 (11th Cir. 1996).

23. U.S. Constitution, Amend. II. See Justice Thomas's concurring opinion in *United States v. Printz*, 117 S.Ct. 2365 (1997).

24. U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Selected Findings*, NCJ-14820, p. 1 (July 1995); *Staples v. United States*, 511 U.S. 600, 613-614, n. 8 (1994).

25. *Staples*, note 24, *supra*, 511 U.S. at 610.

26. *Id.* at 611.

markets, county fairs and other expositions around the country American citizens buy, sell and trade firearms in private transactions which do not require a federal firearms license ("FFL"). It is counterintuitive to suggest that they are, collectively or individually, aware of the requirement for an FFL should their occasional transactions rise to a level which the BATF might consider "engaging in the business."²⁷

As the historical record demonstrates, BATF has considered almost any level of activity to constitute "engaging in the business," with tragic consequences for innocent citizens. It is these consequences Congress sought to end by imposing a higher burden of proof on the government through the FOPA amendments.

III. The requirement for specific knowledge is supported by the better reasoned decisions of the courts of appeals.

The court of appeals here was bound to follow -- albeit with no discernible enthusiasm -- the law of the Second Circuit as enunciated by an earlier panel. That earlier decision, *United States v. Collins*, 957 F.2d 72 (2d Cir. 1992), cert. denied, 504 U.S. 944 (1992), involved an unlicensed dealing situation similar to the one here and held it was harmless error for the district court to fail to charge the jury that the crime of unlicensed dealing in firearms must be willful.

27. See *Staples*, *id.* at 614 and n. 9. Indeed, given the arcane and complicated definitions of the GCA governing dealing in firearms, it may be counterintuitive to suggest that even a lawyer would understand the ramifications. See 18 U.S.C. §§ 921(a)(10), (11)(A) - (C), (12), (13), (21)(A) - (F), and (22).

Three courts of appeals have now had an opportunity to decide exactly the same issue in light of *Collins* and each has correctly rejected *Collins*.²⁸

Collins involved a rather extraordinary situation where, six years after passage of FOPA, the government managed to get all the way through investigation, indictment, trial, verdict and appeal before discovering there was a tiny little technical requirement of "willfulness" embedded in the statute it was seeking to enforce. 957 F.2d 72 at 74. The defense was apparently equally ignorant of the law in failing to request a willfulness instruction, as was the trial court in failing to give one.

Striving mightily to sustain the result of this comedy of errors the court of appeals managed only to further confuse the situation. In a passage which defies understanding the court held that the district court's failure to instruct on willfulness somehow "presumed" willfulness to exist: "Here, the district court, through its failure to charge [willfulness], presumed that willfulness existed." *Id.* at 75. To the contrary, there is no evidence that anyone connected with the trial gave any thought to the mental element of the offense.

The court then engaged in an analysis of willfulness that renders it no different from "knowing" -- thereby failing to grasp that the statute under examination used these two different standards to punish two different sets of offenses. Since *Collins* raised an entrapment defense, which conceded the commission of the physical acts charged, he thereby admitted he had knowledge of his acts

28. *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994); *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995); and *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996).

and the jury thus had proof of "willfulness." Therefore, according to the court, it was harmless error, beyond a reasonable doubt, that the word "willful" never crossed anyone's lips at trial.

Collins has rightly (and unanimously) been criticized by the three circuits which have rejected it. In *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994), the court, after holding that "willfully" as used in Section 924(d)(1)(A) required proof of "an intentional violation of a known legal duty," stated:

In reaching the opposite conclusion in *Collins*, the Second Circuit neither discussed [*United States v.*] *Sherbondy* [865 F.2d 996 (9th Cir. 1988)] and [*United States v.*] *Hern* [926 F.2d 764 (8th Cir. 1991)], nor attempted to differentiate between FOPA's "knowingly" and "willfully" standards. See 957 F.2d at 74-76. Indeed, *Collins* failed even to note that FOPA applies a "knowingly" standard to others. Thus, we are not persuaded by the Second Circuit's analysis....

38 F.3d 309 at 315.

In *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995), the court stated, "Although we recognize the Court of Appeals for the Second Circuit reached a contrary result in *United States v. Collins*, ... we concur with the discussion of *Collins* in *United States v. Obiechie*...." 64 F.3d 126 at 130, n. 6. The court stated that "in light of the legislative history, it is difficult to understand what more the 'willfully' language could require, if not knowledge of

the law," *ibid.*, and went on to reverse and remand for failure to give the required specific intent instruction.

In *United States v. Sanchez-Corcino*, 85 F.3d 549, at 553, n. 1 (11th Cir. 1996), the court stated:

In agreeing with the Seventh Circuit [in *Obiechie*], we necessarily disagree with the Second Circuit's contrary interpretation of Section 924(a)(1)(D) in *Collins*. In *Collins*, the Second Circuit, without noting the "willfully" requirement's statutory context, looked straight to the statute's legislative history to guide its interpretation. Based upon its reading of the legislative history, the Second Circuit concluded that the willfulness requirement did not contemplate knowledge of the law, but required the Government to prove only that "the defendant intended to commit an act which the law forbids." *Collins*, 957 F.2d at 76. This analysis ignores the effect of Congress's use of "knowingly" in the adjacent subsections of the statute on the meaning of "willfully" in 924(a)(1)(D), a point that, as did the *Obiechie* court, we think is critical to a proper interpretation.

Each of the three circuits held that "willfully" as used in 18 U.S.C. § 924(a)(1)(D) requires the government in a prosecution for unlicensed firearms dealing to prove that the defendant intentionally violated a known legal duty, *i.e.*, that he knew an FFL was needed to deal in firearms, lacked such a license, and nevertheless engaged in dealing. See also *United States v. Hern*, 926 F.2d 764 (8th Cir. 1991) (where the government conceded that FOPA's use of

the term "willfully" meant the "intentional violation of a known legal duty"); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995) ("On the other hand, 'willfully,' especially in a statute in which Congress simultaneously uses 'knowingly,' connotes a more deliberate criminal purpose, sometimes to the point of requiring a specific intent to violate the law"); and *United States v. Otiaba*, 862 F.Supp. 251 (N.D. 1994) (where the court rejected *Collins* both because the legislative history it cited was contrary to its conclusion and its ruling was ambiguous).

CONCLUSION

The Court should determine that the term "willfully" as used in 18 U.S.C. § 924(a)(1)(D) requires proof beyond a reasonable doubt that the defendant in a prosecution for unlicensed dealing in firearms under 18 U.S.C. § 922(a)(1)(A) knew he was required to have a federal license and consciously disregarded that duty. The decision below should be reversed.

Respectfully submitted,

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